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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DEVIN HERNANDEZ, Defendant and Appellant.	D069788 (Super. Ct. No. SCD263462)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel F. Link, Judge. Affirmed as modified with directions.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

As part of a plea agreement, Devin Hernandez pleaded guilty to one count of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)) and admitted he inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). The remaining counts and allegations were dismissed. The parties also agreed Hernandez would receive probation, subject to 270 days in jail. Hernandez was sentenced in accordance with the plea agreement.

At the sentencing hearing the court proposed to impose an "electronic search condition" requiring Hernandez to provide access to a range of data on his electronic devices.[2] Hernandez objected arguing there was no nexus between the current offense or his background that would justify permitting searches of his electronic devices. The court rejected the defense arguments, concluding the court had regularly been imposing such conditions and would do so here.

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 The terms of the challenged condition are: "The defendant is ordered to volunteer and disclose to any law enforcement officer who contacts [him] that [he] has a 4th waiver/search waiver. [¶] In conjunction with the 4th waiver/search waiver conditions listed above, the defendant provides specific consent within the meaning of P.C. § 1546 et seq. to probation and/or a law enforcement government entity seeking information protected by the California Electronic Communication Protection Act. This consent includes consent to seize and examine call logs, text and voicemail messages, photographs, emails, and social media account contents contained on any device or cloud or internet connected storage owned, operated, or controlled by the defendant, including but not limited to mobile phones, computers, computer hard drives, laptops, gaming consoles, mobile devices, tablets, storage media devices, thumb drives, Micro SD cards, external hard drives, or any other electronic storage devices, by probation and/or a law enforcement entity seeking the information. [¶] The defendant shall also disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any of the aforementioned devices or social media accounts."

Hernandez appeals contending the search condition was overbroad and not justified by the offense or the needs to rehabilitate the defendant. We agree and will direct the court to strike the electronic search condition.

STATEMENT OF FACTS

Hernandez with three or four others got into a fight with another person. During the fight, Hernandez stabbed that person.

DISCUSSION

At the time of sentencing the probation officer recommended the imposition of an "electronic search condition." In response to the defense counsel's objections the trial court made the following observations:

> "I believe it's being requested by probation, it's being requested by the prosecutor's office, and I have been routinely signing them as a condition of his probation. I'm going to make it a condition of his probation that not only can he be searched, his person, his place of residence, and his property, but also his cell phone, he must give up any passwords. So I am making that a condition of his probation, and at the end of it, I will ask him if he accepts all of the terms and conditions of his probation. If he doesn't want to accept that condition, then we'll have to figure out what to do next."

The court thereafter imposed the challenged condition. Hernandez contends the condition has no nexus with the offense, his background or the reasonable methods of supervision while on probation. The court, and the People seem to reason that the condition would aid in supervision by probation and that is all that is required. At base, the court's position is that the condition is "routine" and regularly imposed.

As we will discuss, the challenged condition is a significant intrusion into constitutionally protected conduct. As the high court discussed in *Riley v. California*

(2014) 134 S.Ct. 2473 (*Riley*) enormous amounts of personal data are often stored in electronic devices such as smart phones and computers. The court in *Riley* held the Fourth Amendment protection for such devices ordinarily requires a search warrant to gain access, even where the owner has been arrested in possession of the device, absent some extraordinary circumstance. (*Id.* at p. 2479.) Although probation conditions may allow intrusion into areas of protected privacy, such intrusions must be narrowly tailored and reasonably related to the offense, the offender and to the legitimate need to prevent further criminality. (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

The trial court's approach to electronic search conditions as simply "routine" would permit their imposition in virtually all probation cases, regardless of the offense, the offender or the needs of supervision. Limitations on otherwise lawful activity must be narrowly tailored to avoid unnecessary intrusion into constitutionally protected activity. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890-892.) We will turn first to the applicable legal principles.

A. Legal Principles

Trial courts have broad discretion to impose conditions of probation in order to attempt rehabilitation of an offender and to prevent such person from continuing to engage in criminal behavior. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).)

In *People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*), the court held that in order to invalidate a probation condition the test from *Lent, supra,* 15 Cal.3d 481 requires a showing that the condition bears no relationship to the crime for which the person was

convicted, relates to conduct which is not itself criminal, and requires or forbids conduct which is not reasonably related to future criminality.

Whether electronic search conditions can be imposed as conditions of probation is before our Supreme Court in *In re Ricardo P*. (2015) 241 Cal.App.4th 676 (review granted Feb. 17, 2016, S230923). Pending further direction from our high court we must undertake to resolve this case as best we can.

There is some disagreement among the appellate courts as to the appropriateness of electronic search conditions. The First District Court of Appeal itself has a split of authority among its divisions. In the case of *In re P.O*. (2016) 246 Cal.App.4th 288, 291-292, Division One of the First District held an electronic search condition could be imposed to assist probation supervision, but that the condition in that case was overbroad. The court noted, however that another division had reached a different result, as did the Sixth District.

The cases of *In re J.B.* (2015) 242 Cal.App.4th 749, *In re Erica R.* (2015) 240 Cal.App.4th 907, and *People v. Soto* (2016) 245 Cal.App.4th 1219, all reached a contrary result, holding the electronic search conditions were invalid in those cases.

B. Analysis

Our analysis of the current case is driven in part by the reasons, or perhaps the lack of reasons for the imposition of a significant search condition on this probationer. Other than the trial court's view such conditions are "routine" and that the probation officer asked for it, there is no analysis in this record of why such an intrusion was necessary because of the crime or the offender. In short, the trial court's analysis would

permit the imposition of this search condition on all probationers as a matter of "routine." We find such reasoning inconsistent with the directions in *Lent, supra,* 15 Cal.3d 481 as further discussed in *Olguin, supra,* 45 Cal.4th 375.

Considering this record, the crime was violent and serious. It did not, however involve any clandestine activity, drugs, or the use of any electronic communication system. The offender has no prior criminal history and no record of use of electronic devices to participate in unlawful conduct.

Turning to the third prong of *Lent, supra,* 15 Cal.3d 481, whether the condition reasonably serves to deter future criminality. While such conditions may be helpful in supervision, the vast scope of the intrusion is not offset by any significant potential increase in avoiding recidivism. By such reasoning probation conditions could justify maximum intrusion into otherwise lawful behavior because the greatest amount of monitoring will always provide some help in deterring future criminal conduct. We do not believe the court in *Lent* and *Olguin, supra,* 45 Cal.4th 375 have endorsed such a broad interpretation of deterring future criminal conduct.

In the present case there is simply no nexus between the electronic search condition and the offense involved or the offender's background or future challenges. Indeed, the trial court made no effort to analyze the relationship of the search condition to the rehabilitation of the defendant. It is without dispute that the electronic search condition imposed here is a massive intrusion into otherwise constitutionally protected activity. Such intrusion is not justified on the record before us. Therefore, we will direct the trial court to strike the condition.

DISPOSITION

The trial court is directed to strike the electronic search condition imposed here as a condition of probation and to modify the judgment accordingly. In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.